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IN THE

Supreme Court of the United States

October Term, 1955

No.

LOUIS J. FARONE,
Petitioner,
v.
THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

The petitioner, Louis J. Farone, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on March 10, 1955, including a review of the preliminary matters herein decided in the judgment of the Court of Appeals of the State of New York entered in the above entitled case and others on July 15, 1952. [Reported as The People of the State of New York, Respondent, vs. John Brophy, Appellant (and ten other actions).]

Opinions Below.

Court of Appeals, State of New York:

The People of the State of New York vs. John Brophy (and ten other actions), 304, N. Y. 391 (App. 7a-11a).

The People of the State of New York vs. Louis J. Farone (not yet officially published) (App. 12a-17a).

Appellate Division, Third Department, Supreme Court, State of New York:

The People of the State of New York vs. John Brophy (and ten other actions), 279 App. Div. 479 (App. 18a-19a).

The People of the State of New York vs. Louis J. Farone, 284 App. Div. 589 (App. 20a-29a).

Supreme Court, State of New York:

The People of the State of New York vs. John Brophy (and ten other actions) (not published) (App. 30a-35a).

Jurisdiction.

The final judgment of the Court of Appeals of the State of New York was made and entered on March 10, 1955 (App. 1a).

The judgment of the Court of Appeals of the State of New York on the preliminary matter of the selection of the Grand Jury, also sought to be reviewed herein, was made and entered on July 15, 1952 (App. 3a).

The order of the Court of Appeals of the State of New York denying petitioner's motion for re-argument and amending the remittitur in *People vs. Brophy* was made and entered on April 21, 1955 (App. 5a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented.

1. During the selection of the Grand Jury which returned the indictment herein:

a. prospective jurors were given a list of 234 names of Saratoga County public officials and

others, and the venireman's mere acquaintance among such persons was sufficient as a ground for exclusion and

b. the trial court justice was furnished secret information sheets on the prospective jurors and used this information in ruling on challenges (App. 38a-57a).

Petitioner submits that this procedure resulted in a "packed" Grand Jury prejudicial to him.

The question presented is whether this procedure violated the petitioner's rights under the Fourteenth Amendment of the Constitution of the United States so as to warrant reversal of the judgment of conviction herein.

2. During the selection of the trial jury, the names of seven veniremen were drawn from the jury wheel and by order of the trial judge returned to the wheel without examination or challenge (App. 110a-119a).

Section 387 of the New York State Code of Criminal Procedure provides:

> "The first twelve persons who appear, as their names are drawn and called, who are approved as indifferent between the parties, and are not discharged or excused, must be sworn; and constitute the jury to try the issue."

The question presented is whether this procedure in excluding the seven veniremen without examination or challenge violated the petitioner's rights under the Fourteenth Amendment of the Constitution of the United States so as to warrant reversal of the judgment of conviction herein.

3. During the trial a question as to the misconduct of a juror arose. After the jury returned its verdict, the Court conducted a formal inquiry into the alleged misconduct (App. 152a-158a).

Petitioner's attorney was not permitted to take part in this inquiry (App. 152a).

The question presented is whether refusal of the Trial Justice to permit petitioner's attorney to participate in this inquiry deprived petitioner of his right to counsel at all stages of the proceeding in violation of his rights under the Fourteenth Amendment of the Constitution of the United States of America so as to warrant reversal of the judgment of conviction herein.

Constitutional Provisions Involved.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Amendment XIV, Sec. 1, Constitution of the United States.

Statement.

Petitioner Farone was convicted of the crimes of conspiracy (three counts), common gambler (two counts), keeping a gambling house (three counts), and receiving bets and wagers (six counts), after a jury trial in an Extraordinary Special and Trial Term of Supreme Court in Saratoga County, New York, on May 2, 1953 (App. 20a).

Upon appeal, the Court of Appeals of the State of New York modified the judgment by dismissing the six counts

of receiving bets and wagers and affirmed the judgment as modified (App. 2a, 17a).

Selection of the Grand Jury.

As the selection of the Grand Jury began, the Special Prosecutor appointed by Governor Thomas E. Dewey presented each prospective juror with a list of 234 names including "all or most of the town and county officials of Saratoga County" (App. 42a-43a) and each was asked to mark thereon anyone he knew (App. 43a).

Acquaintanceship with these named persons was made the ground for challenges and jurors with such acquaintanceship were excluded (App. 38a *et seq.*).

The Prosecutor provided the Trial Court Justice with 234 sheets or "dossiers" on the first panel of prospective jurors called (App. 41a-42a, 94a-95a).

The Judge referred to these sheets and the information thereon which contained "results of investigations of the backgrounds" of the prospective jurors (App. 95a) in ruling on all applications to be excused from jury duty and on all challenges (App. 42a).

Petitioner contended this procedure to be a violation of his rights under the Fourteenth Amendment of the Constitution of the United States in a motion to dismiss the indictments made at Special Term of Supreme Court, Albany County (App. 36a).

Supreme Court Justice Schirick granted the motion (App. 30a) and dismissed the indictments.

The Appellate Division of the Supreme Court, Third Department reversed Justice Schirick on the authority of *People v. Prior*, 294 N. Y. 405, saying:

> "In our opinion the errors assigned here did not justify a finding that the Grand Jury, as finally selected, was not a constitutional body, or that any constitutional rights of the defendants were violated, within the principles enunciated by the decision of the Court of Appeals in the *Prior* case as we understand it" (App. 18a).

The Court of Appeals affirmed the Appellate Division; three of the six judges sitting concurring only on the compelling authority of *People vs. Prior*, 294 N. Y. 405 (discussed below) in which there had been vigorous dissents (App. 7a).

The prevailing opinion said in part:

> "If the jury as impaneled is an impartial body, no constitutional rights may be said to have been impinged upon, and mere error, not resulting in prejudice, is insufficient to invoke the power of the courts to look behind the indictments in a case not provided by statute (*People vs. Prior*, 294 N. Y. 405; *People vs. Glen*, 173 N. Y. 395; *People vs. Petrea*, 92 N. Y. 128; *Rawlins vs. Georgia*, 201 U. S. 638; see also *People vs. Borgstrom*, 178 N. Y. 254; *Hyde vs. United States*, 225 U. S. 347, 374). 'The defendant's right is a neutral jury. He has no constitutional right to friends on the jury' (*Fay vs. New York*, 332 U. S. 261, 288-289). There is no claim here that any member of the grand jury was individually biased or prejudiced against defendants, and hence there can be no prejudice in the exclusion of talesmen, unless it be shown that there was a 'sustained, systematic effort by the court arbitrarily to exclude from the final panel persons of a particular classification' (*People vs. Prior*, *supra*, p. 410). It is our conclusion that no such unlawful effort appears in this record" (App. 8a-9a).

The remittitur of the Court of Appeals was amended to state that this constitutional question had been considered and disposed of (App. 4a).

Selection of the Trial Jury.

During the selection of the trial jury seven names were drawn from the jury wheel as prospective jurors and their names returned to the wheel by order of the Trial Judge without examination or challenge (App. 110a *et seq.*).

Section 387 of the Penal Law of the State of New York (*supra*) requires that the first twelve jurors whose names are drawn who are not discharged or excused shall constitute the jury.

Trial counsel for petitioner moved for a mistrial and stated, "It is clearly a violation of the constitutional rights to just change this procedure, now, in the face of this confusion" (App. 118a).

The Court denied the application for a mistrial (App. 118a).

The constitutional point was raised by petitioner on page 24 of his brief before the New York State Court of Appeals (App. 119a).

Inquiry Into Misconduct of a Juror.

During the closing days of the trial, an alternate juror reported to the Court that a juror had said to her, "Everybody knows that Farone is involved in gambling, that he is right up to his neck in it, and that he served a jail sentence" (App. 123a).

This was in violation of the Court's repeated admonition that the jurors not discuss the case until it was finally submitted to them (App. 135a).

The Court postponed its formal inquiry into the incident until the jury had returned its verdict and then announced:

> "The Court will conduct the inquiry. Counsel for the People or counsel for the defendant will not be given an opportunity to question" (App. 152a).

The Court then proceeded to question the alternate and the accused juror and finally said:

> "That's the end of the inquiry as far as the Court is concerned" (App. 156a).

Trial counsel took exception to this procedure and raised the constitutional question that defendant had been deprived of his right to representation by counsel at all stages of the proceeding by stating:

> "If the Court please, to make the record in this matter complete, as long as it is being made part of our record, I wish to take exception generally to the manner in which the inquiry was handled, on the ground that it is not timely, on the ground that it was not a proper disposition of the complaint made to the Court by a juror, and further on the ground that while it appears that the inquiry is entitled in the matter of the State of New York against Louis J. Farone, that while I was permitted to be present, I was not permitted to take any part in the cross examination or examination of either witness who was called" (App. 157a-158a).

The Court replied:

> "All right. All exceptions are noted" (App. 158a).

At page 48 in his brief before the Court of Appeals of the State of New York, petitioner said:

> "Denial of the right of cross examination is equivalent to denial of defendant's right to a fair trial.
>
> "The United States Supreme Court, on March 8, 1954, held that the defendant should be permitted to participate in inquiries into behavior of jurors.
>
> "*Remmer vs. United States,* 74 S. Ct. 450" (App. 158a).

The Court of Appeals disposed of both the questions of the selection of the trial jury and the inquiry into the alleged misconduct of a juror by part of a single sentence, saying:

> "We find no prejudicial error in the selection of the jury (in the trial court's disposition of the alternate juror's report to him in the *presence of counsel*) * * *" (App. 13a).

Reasons for Granting Writ.

Selection of the Grand Jury.

This was an Extraordinary Grand Jury ordered by Governor Thomas E. Dewey to investigate gambling and corruption in Saratoga County (App. 7a).

In selecting the Grand Jury, the Prosecutor used the method of presenting a list of 234 names of Saratoga County town and county office holders and prominent people to prospective jurors and asserting acquaintanceship with these people, successfully, as grounds for challenge and exclusion (App. 38a *et seq.*).

Consideration of this same method of selecting jurors had split the New York Court of Appeals following an Albany County investigation by an Extraordinary Grand Jury. The Court upheld indictments returned by a Grand Jury so selected by a 4-3 vote but two of the concurring judges wrote opinions criticizing the procedure, so that five of the seven judges voiced disapproval of the method (*People vs. Prior*, 294 N. Y. 405).

In the instant case, in addition to sustaining challenges based on the "list" (as in the *Prior* case), the Trial Court had before it secret "investigation sheets" showing the result of the prosecution's investigation into the

"background" of certain prospective jurors and consulted these in deciding applications for excuses and challenges (App. 38a *et seq.*).

The Court of Appeals upheld these instant indictments (*People vs. Brophy*, 304 N. Y. 391; App. 7a) but of six judges sitting, three concurred only because of the compelling precedent of *People vs. Prior* (*supra*) (App. 11a).

Judge Desmond, in his concurring opinion, said:

> "In 1945, when we decided *People vs. Prior*, I said in dissent (294 N. Y., p. 417 *et seq.*) that the methods used in selecting that Grand Jury violated not only the Code of Criminal Procedure, but all the settled rules, and permitted a prosecutor to exclude and include grand jurors at will. Therefore, I thought and still think, indictments found by a Grand Jury so picked should be dismissed. Methods substantially similar were used in the present case and resulted in some exclusions. I still say that those methods are destructive of the Grand Jury as a traditional instrument of public justice in a free society" (App. 11a).

We respectfully urge that in a rural county like Saratoga, no person eligible for jury duty can be confronted with a list of all its town and county office holders plus its prominent citizens and honestly fail to recognize at least one or more of the names thereon. His neighbors are the town justices, clerks and highway officials of his town. His county officials visit in and are known in all the hamlets and villages of this small county.

Thus, when every prospective juror is open to challenge by his acquaintanceship with one or more on the list; when the choice to challenge or not challenge is exclusively with the prosecutor (for there were no indicted or arrested defendants represented at the selection of this Grand Jury) and when the Court sustains the challenges so made; then

in fact the Prosecutor has the power "to exclude and include grand jurors at will" as Judge Desmond points out (App. 11a).

Add to this the course of the Trial Judge in considering secret background material in ruling on challenges and excuses and it seems clear that this selection of the Grand Jury does not conform "to standards of fundamental fairness that have won legal recognition" and calls for the intervention of this Court "to protect the integrity of the trial process" (*Fay vs. People of the State of New York*, 332 U. S. 261, 294).

> "No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law" (*Fay vs. People of the State of New York*, 332 U. S. 261, 294).

The Court of Appeals has said below:

> "If the jury as empanelled is an impartial body, no constitutional rights may be said to have been impinged upon * * *" (*People vs. Brophy*) (App. 8a).

The record here clearly shows that this Grand Jury was not an "impartial body" but was in fact the controlled tool that the Prosecution had hand-picked it to be.

The original indictments herein charge the defendant with 34 counts (App. 38a-40a).

The Prosecution failed to present any evidence on the trial as to 18 counts. These were dismissed by the Court, many by consent (App. 13a).

Would an impartial jury have indicted without evidence?

We respectfully submit that this docile acquiescence with the Prosecution's wishes in voting 18 counts in three separate indictments on which the People were later unable to present a scintilla of evidence clearly points up the pliability and unfairness of this jury and warrants this Court's review of the constitutionality of the innovation in criminal procedure adopted by the Prosecution in selecting it.

Selection of the Trial Jury.

In arbitrarily, and without examination or challenge, excluding the first seven jurors whose names were drawn, we respectfully submit that the Trial Court departed so radically and drastically from the mode and procedure of fair criminal trial as established in New York State as to violate petitioner's constitutional rights.

Hildreth vs. City of Troy, 101 N. Y. 234.
People vs. McQuade, 110 N. Y. 284.

Inquiry Into Misconduct of a Juror.

This was an important part of petitioner's trial. If the alleged statement were made by Juror Williams, then petitioner was tried by a juror who had a preconceived conviction of his guilt. A fair trial was impossible (App. 150a).

The Trial Justice made the inquiry a part of the record of the trial (App. 152a, 154a-155a).

Representation by counsel was completely denied petitioner by the Trial Court's refusal to permit defense counsel to examine or cross examine (App. 152a).

The importance of adequate cross examination in the defense of an accused was indicated by this Court in *Glasser vs. United States*, 315 U. S. 60, 73-76.

This Court recently held that all interested parties should "participate" into such an inquiry into misconduct of a juror.

Remmer vs. United States, 74 S. Ct. 450.

"Participation" in the inquiry should include complete representation by counsel, an opportunity to investigate the charge by examination of other jurors (which was impossible while the jury was hearing the trial and deliberating), and an opportunity to cross examine if "participation" is to meet the constitutional requirement of due process of law.

Proof of misconduct on the part of the juror Williams would warrant reversal of the conviction herein and a new trial.

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."
>
> *Glasser vs. United States,* 315 U. S. 60, 76.

We find no similar case before this Court in which a defendant was arbitrarily deprived of counsel during such an important part of his trial.

Howard vs. Commonwealth of Kentucky, 200 U. S. 164, is distinguishable in that defendant *waived* his right to be present with counsel while the Trial Judge examined a prospective juror regarding statements made *before the jury was sworn.*

Here, there was no waiver by petitioner and the misconduct occurred during the actual trial.

The petitioner respectfully submits that "for want of benefit of counsel an ingredient of unfairness actually

operated in the process that resulted in his'' conviction (*Foster vs. People of State of Illinois*, 332 U. S. 134, 137) and that this presents a question which should be reviewed by this Court.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES F. CARROLL,
Attorney for Petitioner,
Office and P. O. Address,
423 Broadway,
Saratoga Springs, N. Y.

June, 1955.

FILED
JUL 8 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 131

LOUIS J. FARONE,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACOB K. JAVITS
Attorney General of the State
of New York
Attorney for Respondent
State Capitol
Albany, New York

JAMES O. MOORE, JR.
Solicitor General of New York

RUTH KESSLER TOCH
ARTHUR H. CHRISTY
Assistant Attorneys General of New York

Of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

October Term, 1955

No.

LOUIS J. FARONE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

Now comes the respondent in the above entitled cause, by its counsel of record, and opposes the petition herein and asks that the same be denied.

Statement of the Case

Petitioner seeks writ of certiorari to review two judgments of the Court of Appeals of the State of New York.

One judgment was in *People* v. *Farone,* entered March 10, 1955. It affirmed, as modified, conviction of petitioner of the crimes of conspiracy, being a common gambler, keeping a gambling and betting establishment and receiving

bets and wagers. All are statutory crimes in New York State. Trial was in an Extraordinary Special and Trial Term of the Supreme Court, Saratoga County, State of New York, upon three indictments which were consolidated for trial. The modification of the judgment of conviction was to dismiss six counts of one of the three indictments for the reason that the statute upon which they were handed up was improperly construed to cover the operations involved in the case (p. 14a; 308 N. Y. 305, 311).*

The other judgment sought to be reviewed was in *People* v. *Brophy,* entered July 15, 1952. It affirmed an order of the New York Appellate Division which had reversed an order of Special Term dismissing the indictments which had been returned by the Grand Jury sitting at the Extraordinary Term referred to above (p. 7a; 304 N. Y. 391), and had reinstated the indictments. Petitioner here was one of the eleven moving parties who had moved for dismissal of the indictments.

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1257(3), claiming violation of his rights under the due process clause of the Fourteenth Amendment of the Constitution of the United States by reason of three occurrences: Two transpired at his trial, and are discussed in the succeeding subdivision of this brief under *People* v. *Farone.* One was in connection with the impaneling of the Grand Jury, and is discussed in the succeeding subdivision of this brief under *People* v. *Brophy.*

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* References are to the petitioner's printed Appendix.

The Facts

Both cases which are the subject of this petition arose out of an inquiry into violations of law relating to gambling, bribery and corruption, public officers and offices, the collection of public revenues and administration of justice in Saratoga County, New York State. On or about April 1, 1951, by proclamation of the Governor of New York, an Extraordinary Term of the Supreme Court of the State for Saratoga County was convened to conduct the inquiry. On its face the order contemplated a broad and searching scrutiny into the conduct of public officers, political figures, employees of the County and municipalities therein, especially those officials whose duty it was to enforce the State statutes relating to gambling, bribery, extortion and corruption (p. 58a).

Prior to the ordering of this investigation, the Special Committee of the United States Senate to Investigate Crime in Interstate Commerce—the "Kefauver Committee"—had held hearings in New York City at which there had been testimony of organized gambling and corruption in Saratoga County. The inference was left that public officials had closed their eyes to what was going on; that political figures were involved (p. 96a).

People v. Farone

Petitioner here was one of the persons indicted by the Grand Jury sitting in the Extraordinary Term. He was tried on three indictments returned against him (*supra*, Statement of the Case).

In this petition for certiorari, he protests two occurrences at the trial as constituting denial of due process, viz.:

(a) At the opening of defendant's trial as the clerk commenced the drawing of jurors, it developed that numbers opposite the jurors' names on the printed list furnished counsel, and also used by the clerk, did not in all cases correspond with the numbers on the slips bearing the same names drawn from the box. When this discrepancy had appeared as to the first seven ballots drawn from the box, defendant's counsel protested and asked for a mistrial. This was denied. There was much colloquy. The clerk—sworn at the request of defendant's counsel—explained what apparently was the source of the confusion. The trial judge was satisfied that there had evidently been mistakes in the numbering done in the course of the original drawing from the general jury box. Accordingly, he directed that the clerk redeposit the first seven slips in the box, whirl the box thoroughly and start drawing afresh (pp. 107a-119a, 25a).

Petitioner urges that the procedure violated Section 387 of the Code of Criminal Procedure of the State of New York, which provides:

> "The first twelve persons who appear as their names are drawn and called, who are approved as indifferent between the parties, and are not discharged or excused, must be sworn; and constitute the jury to try the issue."

(b) On the last day of the trial at which evidence was taken, an alternate juror approached the Trial Judge to inquire concerning her projected vacation, and asked leave to speak to him alone about a matter pertaining to the trial. When she was told she could do so only in the presence of counsel for both parties, she expressed an unwillingness to speak before counsel since, she said, the matter was very trivial. She was later called to chambers. Counsel

for both sides were present. She then related that about a week previously, as the jurors were on their way to lunch, she heard "someone" say, "Everybody knows that Farone is involved in gambling, that he is right up to his neck in it, and that he served a jail sentence." She was directed to return to the courtroom and not to talk about the matter with the other jurors. After a discussion with counsel the court reserved decision on what to do about the matter. The examination of defendant's final witness was completed in a brief court session on that day, and both parties rested. The next day, there was a further conference with both counsel in the Judge's chambers. The Judge was mindful of the fact that radio and television had been reporting the trial and the fact that defendant was an ex-convict, and virtually all the jurors probably knew it. The Trial Judge thereafter addressed all the jurors in open Court, reminding them that he had regularly admonished them in accordance with Section 415 of the Code of Criminal Procedure. That provision is as follows:

> "The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court, that it is their duty not to converse among themselves on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them."

The court asked the jurors, one by one, four questions designed to ascertain their continuing impartiality and ability to consider the case on the evidence alone, as well as to ascertain whether they had acquired information about the case apart from the evidence, which would render it unfair for them to continue to sit as jurors. No juror's answer indicated inability to consider the case impartially on

the evidence, or that he had information from other sources than the evidence.

After the rendition of the verdict the Trial Court conducted an inquiry in which he limited the questioning of witnesses to himself. On oath the alternate juror confirmed her statement previously made by her. The Judge asked her to identify the person who had made the remark. She answered: "I believe it was Mrs. Williams"; that no one else was present when the remark was made. Mrs. Williams, a regular juror then testified. She swore that she did not recall ever making the comment, and that, as far as she could recall she did not make it. She disclaimed any personal information about the defendant except that before the trial she had read in the papers that he was an ex-convict; that this knowledge did not affect her judgment or influence her verdict. At Mrs. Williams' request the Judge asked that any juror who had heard her make any such remark at any time, tell him. To this request there was no response (pp. 120a-157a; 26a-27a).

Petitioner urges that his attorney should have been permitted to cross-examine on this inquiry into the alternate juror's report.

People v. Brophy

This case was a litigation upon a motion by certain defendants including petitioner here, to dismiss the indictments returned against them upon the ground that in the impaneling of the Grand Jury, the procedure was as follows:

The prosecution had made a list of 234 persons, public officials of the county and others whose names had been either

mentioned before the Kefauver Committee or could be anticipated to come up in the course of this investigation, or both. At the impaneling of the Grand Jury, the list was marked in evidence and a copy of it was furnished each talesman drawn for the Grand Jury panel. Each was then asked to indicate whether he was acquainted with any of the names on the list and the nature and relationship to any such persons (Record on Appeal, Court of Appeals of New York, fols. 400-408). The prosecution told the talesman that he wanted them "to understand distinctly" that the appearance of any person's name on the list was not to be taken as carrying any "meaning or suggestion" that he was "guilty of any crimes" (Record on Appeal, Court of Appeals of New York, fols. 403-4).

Some of the talesmen were excused by the Court on their own request, without examination. Others were challenged for cause by the prosecution because of their acquaintance or relationship with public officials whose names appeared on the list. Some of these challenges were sustained by the Trial Judge; others were overruled. Among the talesmen who were accepted and served on the Grand Jury were some who were acquainted with various of the persons on the list (pp. 60a-94a; p. 9a; 304 N. Y. at p. 394).

In the examination of prospective grand jurors, the Trial Judge and the prosecutor had before them facts concerning the age, address, employment and other information concerning the talesmen. This was the written result of an investigation made by the prosecution and was used in challenge to prospective jurors and by the Trial Judge in passing upon the qualifications of the talesmen for service on the Grand Jury (pp. 9a-10a; 304 N. Y. at p. 395).

Objections to Jurisdiction

1. In *People* v. *Farone*, no question under the Federal Constitution was passed upon by the Court of Appeals of the State of New York.

The Court of Appeals expressly declined to amend its remittitur to incorporate a statement to the effect that any question under the Federal Constitution was presented and passed upon by it (p. 5a).

2. In *People* v. *Brophy*, there was not decided a Federal question of substance by the Court of Appeals of the State of New York such as to present that special and important reason which would cause this Court in its sound judicial discretion to review a case on writ of certiorari. The decision of the case was upon principles heretofore determined by this Court and in complete accord with applicable decisions of this Court (Rule 19, subd. 1, subd. 1(a)).

Petitioner here, apparently preliminary to filing the present petition for writ of certiorari and seemingly in an effort to spell out the presence of a Federal question in the instant case, applied to the Court of Appeals of the State of New York for amendment of its remittitur in the *Brophy* case, which had been decided approximately three years theretofore (p. 5a). That Court amended its remittitur in the *Brophy* case to state that questions under the Federal Constitution were presented and passed upon by it:

> "viz: whether the manner of the selection and empaneling of the Grand Jury which returned the indictments herein was in contravention of the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that defendant's rights under the Fourteenth Amendment of the Constitution of the United States had not been violated." (pp. 5a-6a)

ARGUMENT

POINT I

This Court has repeatedly held that it will not intervene in the operation of state jury systems unless a defendant has met "the exacting requirements of proving clearly" that the procedure has "gone so far afield" that its "results" are a denial of due process. Petitioner does not in any wise meet such requirements.

The quoted portions of the above headnote are from this Court's opinion in *Fay* v. *New York*, 332 U. S. 261 at page 284.

None of the three occurrences upon which petitioner bases his petition for a writ of certiorari constituted or resulted in a denial of due process under the Fourteenth Amendment.

No Federal statutory provision is here involved nor invoked. Petitioner invokes the Fourteenth Amendment only.

A

Re: People v. Farone

The procedure at his trial did not deny to petitioner due process under the Fourteenth Amendment.

The Court of Appeals declined to amend the remittitur in this case to state that a Federal question had been presented or passed upon (p. 6a; 308 N. Y. 904).

Both the Court of Appeals and the Appellate Division considered petitioner's objection to the return to the wheel

of the first seven names of prospective trial jurors drawn therefrom, and his objection in respect to the inquiry into the alternate juror's report to the trial judge. Both Courts examined the occurrences as raising questions of prejudicial error, but not of constitutional infringement. This is abundantly plain from the opinions.

The Court of Appeals' unanimous opinion held that the Court found "no prejudicial error" in either procedure; neither "in the selection of the jury" nor "in the trial court's disposition of the alternate juror's report to him in the presence of counsel" (p. 13a; 308 N. Y. at p. 310).

The Appellate Division discussed the two incidents at substantial length (pp. 25a-28a; 284 N. Y. App. Div. at pp. 594-6).

As to the return to the wheel of the first seven names of prospective jurors, the Court (noting that two of these seven were "subsequently called, examined and excused", p. 25a; 284 N. Y. App. Div. at p. 595), declared:

> "This incident was an innocent error on the part of a court officer. The solution adopted by the Court can in no sense be deemed to have been prejudicial to defendant. The error was, at the most, a technical one, which cannot be said to have affected the substantial rights of either party (Code of Criminal Procedure, sec. 542)."

This is in accord with the ruling of this Court in the *Fay* case as to one subject of complaint made there, that

> "It appears to be an administrative ineptitude of no constitutional significance and of no prejudice to these defendants" (332 U. S. at p. 278).

And see specifically, on an incident comparable to that in the Farone case, *Hyde* v. *United States,* 225 U. S. 347, 374.

As to the inquiry into the alternate juror's report to the trial judge, the Court declared that the trial court's determination was "entirely reasonable"; that the matter had been "handled with care and caution and, we hold correctly" (pp. 27a-28a; 284 N. Y. App. Div. at p. 596).

Not only was the factual situation different in *Remmer* v. *United States,* 347 U. S. 227, cited by petitioner (p. 13 of petition), but the trial there was in a Federal court and this Court deems that it has supervisory power in the realm of policy over Federal proceedings "not necessarily embodied in the concept of due process" which it would not exert over proceedings in State courts (*Fay* v. *New York,* 332 U. S. at pp. 287, 282, 294-5, 271; *Buchalter* v. *New York,* 319 U. S. 427, 430-1; *Howard* v. *Kentucky,* 200 U. S. 164, 173). In the *Buchalter* case, this Court declared that the due process clause of the Fourteenth Amendment does not enable it to review even errors of state law (319 U. S. 427, 431).

In so far as both episodes brought for review to the State appellate courts questions of fact, the conclusion of the State courts thereon is given great weight by this Court.

B

Re: People v. Brophy

In *People* v. *Brophy*, the Court of Appeals passed upon the defendant's constitutional objections to the manner of selection of the Grand Jury. It discussed them fully in its opinion. Citing decisions of this Court, it said at one point of the opinion:

> "If the jury as empaneled is an impartial body, no constitutional rights may be said to have been impinged upon" (p. 8a; 304 N. Y. at pp. 393-4).

Elsewhere the Court pointed out:

> "* * * The selection of jurors appears to have been motivated solely by the desire of court and prosecutor to obtain a jury which, under all the circumstances, could consider matter brought before it in a manner fair both to accused persons and to the People of the State of New York" (p. 9a; 304 N. Y. at p. 394).

The Court which cited the *Fay* case in its opinion (p. 10a; 304 N. Y. at pp. 394-5) was, when it upheld the manner of selection of this particular Grand Jury, following precepts laid down by this Court in the *Fay* case:

> "Each of the grounds of elimination is reasonably and closely related to the juror's suitability for the kind of service the special panel requires" (332 U. S. at p. 270).

At pages 288-9 of the *Fay* opinion, this Court said:

> "Society also has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury."

See also *Brown* v. *United States*, 175 U. S. at p. 175; *Howard* v. *Kentucky, supra*, 200 U. S. at p. 175; *Hyde* v. *United States, supra*, 225 U. S. 347, 374.

The Grand Jury here was being impaneled to consider presentments in an inquiry into violations of law relating to gambling, bribery and corruption assertedly involving local public officials. In order to insure a fair consideration to the public as well as persons respecting whom presentments would be handed up, the questions to the prospective talesmen as to whether they knew the public officials and others on the list and the nature of the relationship to such persons, as well as the investigation into the background of the prospective talesman to learn whether there were any hidden relationships with such public officials and others, were "reasonably and closely related to the juror's suitability for the kind of service" the panel would be called upon to render (*Fay* v. *New York*, 332 U. S. at p. 270).

Conclusion

Howsoever a jury is impaneled, this Court has never found a violation of the Constitution in that some persons were rejected who might under a different procedure have been chosen. The sole criterion this Court has ever set is whether a defendant was prejudiced by the selection of the talesmen who were ultimately chosen. There is no showing here that there was or could be any contention on that score in respect to either the grand jury or the trial jury in this case. Nor, in so far as either jury is concerned, was any class to which petitioner belonged or any class at all excluded from the juries (*Fay* v. *United States, supra*, 332 U. S. 261; *Hyde* v. *United States, supra*, 225 U. S. 347, 374; *Rawlins* v. *Georgia*, 201 U. S. 638, 640; *Howard* v. *Kentucky, supra*, 200 U. S. 164, 174; *Brown* v. *New Jersey, supra*, 175 U. S. 171, 175; *Hayes* v. *Missouri*, 120 U. S. 68, 71).

In *Fay* v. *New York (supra)*, 332 U. S. 261, 296, the late Mr. Justice Jackson, writing for this Court, concluded as follows:

> "As there is no violation of a federal statute alleged, the challenge to this judgment under the due process clause must stand or fall on a showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law. On this record we think that showing has not been made."

No more has petitioner here shown that he has had a trial so unfair as to amount to a taking of liberty without due process of law.

The writ of certiorari petitioned for here should be denied.

Dated: July 1, 1955.

Respectfully submitted,

JACOB K. JAVITS,
Attorney General of the State
of New York,
Attorney for Respondent,
State Capitol,
Albany, New York.

JAMES O. MOORE, JR.,
Solicitor General of New York.

RUTH KESSLER TOCH,
ARTHUR H. CHRISTY,
Assistant Attorneys General of New York,

Of Counsel.